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ARTICLES

Blocking and Clawing Back in the Name of Public Policy: The United Kingdom's Protection of Private Economic Interests Against Adverse Foreign Adjudications

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Like their common law cousins, the courts of the United Kingdom have long claimed the authority to decline recognition to foreign sovereign acts which pose a threat to their nation's public policy. This Article surveys the British cases in which such discretion has been or might have been exercised, and it concludes that the doctrine is no longer applied in the very instances for which it was developed. Instead, it appears that the doctrine is, in its old age, used merely as a pretext for the advancement of British economic inter-

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† One small but important matter of terminology should be addressed at the outset. The United Kingdom is not, of course, a federal nation, but it does contain three distinct legal systems, each of which maintains its own jurisprudence and controls its own bar. One of those systems, the subject of this Article, governs England and Wales and is the basis for all other common law systems in force in the world today. Another system, also one of common law, governs Northern Ireland, and a third regime based upon the civil law prevails in Scotland. No offense is intended to my Welsh, Irish, or Scottish friends when I use the terms "English," "British," and "United Kingdom" interchangeably to refer to the cases and courts that are the subject of my work.

ests at the expense of international comity. A new model for the application of the old public policy doctrine is suggested, in which courts must take care to establish a nexus between their own authority, the refugee from foreign power, and the subject matter of the controversy, before interfering with the otherwise lawful activity of a foreign sovereign.

INTRODUCTION: THE EXTRATERRITORIAL APPLICATION AND RECOGNITION OF DOMESTIC LAW GENERALLY

The story of modern commerce is, increasingly, the story of national frontiers opening to admit the goods and servicepeople of other allied lands. Each member of the international community now expects to find its citizens, both natural and corporate, doing business beyond its borders. Yet states also continue to expect their citizens to remain subject to the jurisdiction and authority of their sovereign, just as they expect their guests from other states to fall equally under their control. Obviously, neither a citizen's host nor his homeland can exercise exclusive control over his actions, for a sovereign might then legally command the commission in a foreign territory of an act proscribed by the law of that place.

The relative bounds of one sovereign's authority to order acts contrary to the law or policy of another sovereign with a legitimate claim to the exercise of governmental powers is a subject of some contention. The dispute arises in the exercise of both legislative and judicial jurisdiction—the former being the power of one state to apply its law to situations implicating a foreign element, and the latter being the power of a state's courts to adjudicate cases containing such an element.¹ The promulgation of law cannot be distinguished from its application using these categories if both of those sovereign acts aim to regulate conduct which is also properly the business of another sovereign authority; not all such acts, of course, are *per se* unreasonable as a matter of international law or comity,² but a principled balance must be struck. This Article will argue

¹ Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1975).

² The term "comity" is used in this Article in its most basic sense, to refer to "the principle in accordance with which the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of deference and respect." *Doescher v. Estelle*, 454 F. Supp. 943, 948 (N.D. Tex. 1978).

Of late, some courts have undertaken to catalogue the considerations which they feel should be taken into account in deciding whether the American judiciary should act or decline to act on grounds of international comity in specific situations. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294-98 (3rd Cir. 1979) and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976). See also Note, *The Inconvenient Forum and International Comity in Private Antitrust Actions*, 52 FORDHAM L. REV. 399, 402 n.20 (1983). These pro-

that that balance is often ignored or capriciously disrupted by both legislators and judges, with ultimately unfortunate consequences for both the citizens and the sovereigns concerned.

The questions implicated by these problems present themselves in any number of guises. Some conflicts arise when the validity of a foreign decree of divorce or other judgment of personal status is challenged outside the territory of the jurisdiction rendering the judgment, while others are found when, for example, one sovereign's regulation of its corporate citizens' commercial dealings abroad results in the imposition of an alien economic policy upon a foreign government. Both commercial and non-commercial cases will be examined in the material which follows, but particular attention will be paid to instances of international commercial regulation, which often bear directly on the integrity of sovereign interests through efforts or effects which control the domestic affairs of a foreign government. These problems, in particular, will be examined in light of the current conflict between two old friends and close relatives: the governments of the United States and of the United Kingdom. Both nations share a common legal foundation and the judges of each are generally familiar with the mechanisms of adjudication used by their brethren across the Atlantic. Modern political differences and modern economic alliances, however, have driven the brothers apart and led them to words and deeds that have given considerable offense—and which have created much confusion on the part of their respective citizens.

This problem is perhaps best seen in light of the current Anglo-American dispute concerning the application of United States antitrust law to the conduct of British commercial entities. Two weapons are being used by the British with particular frequency in the current battle, and whether they are to be characterized as offensive or defensive depends upon one's point of view. The first weapon, familiar to lawyers in both countries, is the injunction—now being used by judges on both sides of the Atlantic in an attempt to stay their litigant's recourse to one another's courts.³ The second weapon is a creature of statute and is peculiar to the British forces.⁴ Popularly known as the "clawback,"⁵ the

posed tests should not be misunderstood as new definitions of the comity principle. They are simply guides which assist judges in deciding whether this settled principle should be given effect in individual cases.

³ See *infra* text accompanying notes 58-104. The British, however, were the first to put this familiar tool to such a novel use. *Id.*

⁴ See *infra* text accompanying notes 119-41.

⁵ Like the idea behind it, this colorful term is of British invention. See House of Commons Standing Comm. F, Official Report, Dec. 6, 1979, at 62, 65; 404 PARL. DEB., H.L. (5th ser.) 554, 567

Protection of Trading Interests Act, (PTIA)⁶ creates, among other things, a private cause of action in any British citizen or corporation, or person or corporation doing business in Great Britain,⁷ against whom a judgment for treble or other multiple damages has been entered by a non-British court. Such an unsuccessful former defendant may sue as a plaintiff in the British courts and recover from the overseas adversary a judgment equal to the noncompensatory portion of the foreign award. The resulting British judgment, like any other, is then enforceable against any property that might be found in the United Kingdom or elsewhere in the European Economic Community.⁸

At the heart of the battle is heard the rallying cry of "public policy," each country insisting that the effectuation of its legitimate national interests requires that its opinions on the appropriate scope of economic regulation be recognized by the other. "Public policy" is used here in its broadest sense, to refer to the justifications underlying any sovereign act directed at preserving a nation's moral, economic, or political integrity against diminution by another state or private actor.⁹ This Article will argue that the concept of public policy, as used by the United Kingdom, has itself lost much of its own internal integrity and is now being used merely to further private British economic interests at the expense of international comity.

The first part of this Article explores the evolution of the doctrine of public policy in the cases most likely to implicate it, namely those dealing with foreign adjudications of personal status. It concludes that, although talk of the doctrine goes on in that area, the legal concept itself may be on its deathbed and indeed was never very much alive to begin with. The

(1980) (Lord Elwyn-Jones); *Id.* at 590 (Lord Mishcon); 405 PARL. DEB., H.L. (5th ser.) 926, 941 (1980) (Lord Hacking).

⁶ The Protection of Trading Interests Act is reprinted in *The Protection of Trading Interests Act*, ANTITRUST & TRADE REG. REP. (BNA) No. 959, at F-2 (April 10, 1980), and in Note, *The Protection of Trading Interests Act of 1980—Britain's Latest Weapon in the Fight Against United States Antitrust Laws*, 4 FORDHAM INT'L L.J. 341, 384 (1981) [The Act is hereinafter cited as the PTIA].

⁷ See *infra* notes 124-26 and accompanying text.

⁸ Judgments entered by the courts of one member state of the European Economic Community are enforceable in England and throughout the Community pursuant to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, E.C. Bull. Supp. 2/1969 at 17, the 1978 Convention by which the United Kingdom, Ireland, and Denmark acceded to the 1968 Convention, O.J. Eur. Comm. (No. L 304) 1 (1978), and the 1978 Convention's enabling legislation in the United Kingdom, the Civil Jurisdiction and Judgments Act, 1982. See generally I. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 103-46 (1982). But see *infra* text at notes 136-39.

⁹ Such a definition is necessary, since English courts rarely articulate and rely upon the public policy doctrine directly, even when using it to support their decisions. See R. GRAVESON, COMPARATIVE CONFLICT OF LAWS 46 (1977).

second part of this Article considers the instances when that doctrine has, explicitly or implicitly, been used to frustrate foreign adjudications dealing a blow to private English economic interests, and concludes that in that area of law the doctrine is very much alive and poses a substantial threat to international comity. The final section, in turn, suggests a brief model for future application that is both supportive of legitimate English concerns and facilitative of international cooperation and harmony.

I. MARITAL JUDGMENTS AND OTHER PRIVATE, NON-COMMERCIAL LITIGATION

By their own domestic law, certainly, sovereigns may adjudicate the status of persons who come before them voluntarily, or who are brought before them by means consonant with their established procedural rules, but a decree of status must ultimately be measured by its finality and its durability. In the most geopolitically interesting cases involving especially peripatetic or unusually wealthy parties, the acid test of a decree of marriage or divorce is its ability to command recognition by sovereign authorities which had nothing to do with shaping it. At first blush, this is a question of judicial jurisdiction, concerning the extent of recognition to be accorded in the international community to the judgment of a foreign court. The inquiry, however, also involves questions of legislative jurisdiction whenever the rendering tribunal acts pursuant to a legislative grant of authority.

The United States¹⁰ and the United Kingdom¹¹ generally agree that the formal validity of a marriage is to be governed by the *lex loci celebrationis*, or law of the place where the ceremony of marriage was performed.¹² Even so, the courts of both nations assert the authority to refuse recognition to foreign marriages or foreign decrees of nullity or divorce if the challenged proceedings are considered offensive to local visions of proper public policy.¹³

¹⁰ See *Patterson v. Gaines*, 47 U.S. (6 How.) 550, 587 (1848). See also, e.g., *Estate of Levie*, 50 Cal. App. 3d 572, 576, 123 Cal. Rptr. 445, 446-47 (1975); *In Re May's Estate*, 305 N.Y. 486, 490, 114 N.E.2d 4, 8 (1953); see also 52 AM. JUR. 2D *Marriage* § 80 n.9 (1970).

¹¹ See *Starkowski v. Attorney Gen.*, 1954 A.C. 155, 170 (1953); *Berthiaume v. Dastous*, 1930 A.C. 79, 83 (P.C.). See also the cases collected at 8 HALSBURY'S LAWS *Conflict of Laws* 331 n.2 (1973).

¹² But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971), which provides instead that "The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage" *Id.*

¹³ For the United States' position, see, e.g., *K. v. K.*, 393 N.Y.S.2d 534, 535 (1977) and *In Re Chace*, 26 R.I. 351, 356, 58 A. 978, 980 (1904), which held that:

[i]f a marriage is odious by the common consent of nations, or if its influence is thought danger-

Anglo-American law generally forbids a re-examination of the merits of the foreign judgments submitted to its courts for recognition.¹⁴ However, the public policy doctrine has often been used to mask just such inquiries, particularly when the forum court wishes to object to the choice-of-law rules applied by its foreign brethren. The selection of the governing law is ordinarily part of the merits of any adjudication, but many judges in both countries have used the public policy doctrine to deny recognition to foreign judgments whose only real affront was found in an unwelcome choice-of-law rule.¹⁵

ous to the fabric of society, so that it is strongly against the public policy of the jurisdiction, it will not be recognized there, even though it is valid where it was solemnized.

But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971), which would restrain the automatic consideration of the forum state's public policy by instead providing that:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

For the United Kingdom's position, see generally *Vervaeke v. Smith*, [1983] 1 A.C. 145, 153 (1982); *Lepre v. Lepre*, 1965 P. 52, 57 (1962); *Formosa v. Formosa*, 1963 P. 259, 270 (C.A. 1962); and the purely discretionary power to withhold recognition of foreign divorces conferred by the Recognition of Divorces and Legal Separations Act, 1971, § 8(2)(b), discussed in greater detail *infra*.

¹⁴ In the United States, the rule was laid down in *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895):

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

In the United Kingdom, the rule is much the same. The doctrine seems to have first been set out in *Henderson v. Henderson*, [1844] 6 Q.B. 288, 298, 115 Eng. Rep. 111, 115, where the court announced that it would steer "clear of an inquiry into the merits of [a foreign adjudication] upon the facts found: for whatever constituted a defence in [the foreign] Court ought to have been pleaded there" The principle was extended to foreign findings of law in *Godard v. Gray*, [1870] 6 L.R.-Q.B. 139, 147-53.

¹⁵ *Clarke v. Clarke*, 178 U.S. 186 (1900), demonstrates the phenomenon in the United States. There, the Supreme Court held that the full faith and credit clause of the United States Constitution did not require the courts of Connecticut to recognize a South Carolina judgment concerning title to land in Connecticut. Most states would have chosen to apply the law of the land's situs to the dispute; South Carolina did not and its decree was denied recognition. The Supreme Court did not directly admit to basing its decision on an objection to South Carolina's choice-of-law rules, but it did note the effect of those rules on national public policy. "Of what efficacy," it asked, "would be the power of one State to control the administration, through its own courts, of real estate within the State . . . if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another State[?]" *Id.* at 194.

For an example of the same judicial tactic in the United Kingdom, see, e.g., *Formosa*, 1963 P. 259. There, a Maltese court had annulled an English marriage because the ceremony itself had not been performed by a Roman Catholic priest. Such a ceremony was deficient under Maltese, but not English, law. The English Court of Appeals refused to recognize the foreign judgment, but not, it

Since the public policy exception to the recognition of foreign sovereign acts seems to have had its genesis in matrimonial law,¹⁶ it is worth exploring how that doctrine is being applied by the British courts today in that private context, before moving on to a consideration of its application in modern commercial cases. The very existence of separate and equal sovereigns in the world implies that there may be sovereign decrees which are considered dissolved or void *ab initio* in one territory and yet which continue to command (often unwanted) respect in another. The British reaction to this problem has been mixed, but in the sphere of private matrimonial affairs the British position has been generally facilitative of international comity. The United Kingdom is a signatory to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations,¹⁷ and has given that treaty effect through legislation, The Recognition of Divorces and Legal Separations Act (RDLSA),¹⁸ which provides that the validity of an overseas divorce¹⁹ will not be questioned by British courts if, at the date of the institution of the foreign proceedings, either spouse was habitually resident in the foreign country or was a national of that country.²⁰

The RDLSA does, however, exempt from automatic recognition divorces granted at a time when, according to British domestic law, there was no subsisting marriage between the parties²¹ but, of course, the validity of a marriage under British law is generally governed by the *lex loci celebrationis*.²² Also exempted from automatic recognition are divorces granted solely at the behest of one party without notice to the other spouse.²³ Lastly, the Act exempts divorces the recognition of which

said, because it disagreed with Malta's choice of governing law. Instead, recognition was denied on undefined grounds of public policy. *Id.* at 273. See also *infra* note 28.

¹⁶ See generally A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 70-75 (9th ed. 1973).

¹⁷ Hague Conference on Private International Law, *COLLECTION OF CONVENTIONS* 128 (1970).

¹⁸ The Recognition of Divorces and Legal Separations Act, 1971, as amended by the Domicile and Matrimonial Proceedings Act, 1973 [hereinafter cited as the RDLSA]. For a comparison of the Convention and the RDLSA, see Graveson, *La Nouvelle Loi Anglaise sur la Reconnaissance des Divorces et des Separations de Corps*, 61 *REVUE CRITIQUE DE DROIT INT'L PRIVE* 543 (1972).

¹⁹ The RDLSA speaks of foreign "proceedings," RDLSA §§ 2, 6, and that language has been taken to require some affirmative individual judgment by the rendering sovereign; certain non-curial divorces arising wholly by operation of law have been held to be outside the statute entirely. See *Viswalingham v. Viswalingham*, [1980] 1 F.L.R. 15 (C.A. 1980) (available on LEXIS, ENNGEN library, Cases file). But see *Quazi v. Quazi*, 1980 A.C. 744, 800 (1979) [hereinafter cited as *Quazi III*], finding that the modern Islamic ritual of "*talaq*," by which a divorce is unilaterally pronounced by the husband but registered with the state before taking effect, satisfied the statutory requirements. See also *infra* notes 39-46 and accompanying text.

²⁰ RDLSA, *supra* note 18, at § 3(1).

²¹ *Id.* § 8(1).

²² See *supra* note 11 and accompanying text.

²³ RDLSA, *supra* note 18, at § 8(2)(a).

"would manifestly be contrary to public policy."²⁴

This last category is distinct from the others and is the most interesting for the purposes of this inquiry, for it at least in theory allows the United Kingdom to abandon its facilitative practices at will and resort to the sort of international intransigence observed in litigation of a more public and commercial nature. The public policy ground for nonrecognition is wholly discretionary²⁵ and appears to preserve intact a rule of long standing at common law.²⁶ The arguments advanced in connection with the application of this residual power, then, are equally relevant to cases falling wholly outside the ambit of family law, and should be used to define the general scope of authority to refuse recognition to any foreign decrees.

Generally, British courts have been reluctant to openly invoke considerations of public policy when considering the extent of recognition to be accorded a foreign divorce.²⁷ Recognition has never been denied because of sovereign disagreement about the proper scope of marital regulation; that is, British courts continue to routinely recognize foreign decrees grounded in allegations insufficient to support a divorce petition under British law.²⁸ Similarly, British courts generally do not concern themselves with the jurisdictional basis assumed by the divorcing court, once the requisite foreign nationality or domicile of a single spouse has been established.²⁹

There are, indeed, very few cases in which recognition of a foreign

²⁴ *Id.* § 8(2)(b).

²⁵ *Newmarch v. Newmarch*, 1978 Fam. 79, 95 (1977), citing *Hack v. Hack*, 6 FAM. L. 177 (1976).

²⁶ G. CHESHIRE & P. NORTH, *CHESHIRE'S PRIVATE INTERNATIONAL LAW* 389-90 (9th ed. 1974).

²⁷ See *Qureshi v. Qureshi*, 1972 Fam. 173, 200 (1970); *Varanand v. Varanand*, [1964] 108 Sol. J. 693 (P.). See generally G. CHESHIRE & P. NORTH, *supra* note 26, at 389-90; R. GRAVESON, *CONFLICT OF LAWS* 304 (7th ed. 1974).

²⁸ G. CHESHIRE & P. NORTH, *supra* note 26, at 373, 379; R. GRAVESON, *supra* note 27, at 304. Foreign judgments of annulment, however, are subject to closer scrutiny on this ground. See, e.g., *Formosa*, 1963 P. 259, and *Lepre*, 1965 P. 52. In both of these cases, the British courts refused to recognize a Maltese decree annulling a marriage validly celebrated in England, when the foreign judgment was based solely on the ground that the English ceremony had not been performed by a Roman Catholic priest. But see *Merker v. Merker*, 1963 P. 283 (1962), recognizing a German annulment of a Polish marriage valid under British law, despite a technical failure to satisfy the *lex loci celebrationis*.

The extra scrutiny applied to decrees of annulment may reflect judicial concern with the social and proprietary interests of children. Prior to 1973, a decree of nullity granted in respect of a voidable marriage rendered any children of the marriage illegitimate. See *Matrimonial Causes Act*, 1973, § 16. Before 1959, the same was true of void marriages. See *Legitimacy Act*, 1959, § 2.

²⁹ G. CHESHIRE & P. NORTH, *supra* note 26, at 373, 379-80; *RDLSA*, *supra* note 18, at § 3(1).

divorce has been denied for reasons of British public policy.³⁰ Many of the cases which might have been decided on those grounds appear instead to be based on jurisdictional failings in the rendering court,³¹ as when recognition is denied because of fraud allegedly perpetrated against the foreign tribunal.³² In cases in which no fraud was charged, only two British decisions have invoked this apparently dormant authority outright since its resurrection was encouraged by the RDLSA. Even in these two cases, the courts took pains to first establish grounds for non-recognition independent of the public policy concerns.

*Joyce v. Joyce and O'Hare*³³ involved a British wedding of two British citizens; the marriage had deteriorated over time and ultimately the wife found herself deserted by her husband. She sought and was granted a maintenance order by a British court and received regular payments from her absent spouse. Subsequently, her husband emigrated to Canada, where he fell into arrears on his support obligations and eventually filed a divorce petition with the courts of the province of Quebec. Although Mrs. Joyce contested that action by mail, her objections were ignored completely, for Quebec law required a personal appearance by all parties wishing to be heard, and Mrs. Joyce could neither afford to retain Canadian counsel nor travel to Canada herself. A decree of divorce was entered by the Quebec court, which also refused to recognize the British maintenance order and declined to issue any such order of its own. Mrs. Joyce filed for divorce and maintenance in the United Kingdom, where her husband predictably answered that there was no marriage left to dissolve, that job having already been done in Canada.

Judge Lane of the High Court's Family Division considered the foreign divorce in light of the RDLSA and found it wanting under section 8(2)(a)(ii), which authorizes the denial of recognition to foreign divorces obtained by one spouse without "reasonable" efforts having been taken to notify the other.³⁴ Judge Lane also saw fit to invoke her discretion under section 8(2)(b) of the RDLSA, holding that, in any event, the Canadian proceedings were so offensive to British public policy that they were not entitled to recognition under any circumstances.³⁵ Judge Lane did not

³⁰ As recently as 1973, it was reported that no such cases could be found in British law. A. DICEY & J. MORRIS, *supra* note 16, at 326.

³¹ G. CHESHIRE & P. NORTH, *supra* note 26, at 387-88.

³² See, e.g., *Kendall v. Kendall*, 1977 Fam. 208; *Macalpine v. Macalpine*, 1958 P. 35 (1957); *Rudd v. Rudd*, 1924 P. 72 (1923); *Bonaparte v. Bonaparte*, 1892 P. 402.

³³ 1979 Fam. 93 (1978), noted in 43 MOD. L. REV. 81 (1980).

³⁴ *Joyce*, 1979 Fam. at 113-14.

³⁵ *Id.*

“seek to define or describe”³⁶ that concept further, but merely set out her opinion in a single conclusory sentence³⁷ relying for authority on *dicta* found in her Family Division colleague’s opinion in the then-pending case of *Quazi v. Quazi*.³⁸

Judge Lane’s reasoning in *Joyce* now seems questionable in light of the House of Lords’ ultimate disposition of *Quazi v. Quazi*,³⁹ which reversed the lower court rulings⁴⁰ denying recognition to a Pakistani “*talaq*” divorce. The *talaq* is a procedure under ancient Islamic law which, in its classical form, allowed a husband to divorce his wife simply by pronouncing the words “I divorce thee” a specified number of times before witnesses. No notice to the wife was required at all, and the ceremony could be conducted in her absence.⁴¹ Many modern Islamic states, including most of Pakistan, have amended the historic law to require in addition that the *talaq* be recorded with the public authorities and that the wife be told that her marriage is about to be dissolved.⁴² The House of Lords found that the modern procedure was not objectionable under British law.⁴³ The issue on appeal did not directly involve the general jurisdiction to refuse recognition on public policy grounds, for the trial judge had not based his decision in that power,⁴⁴ but Lords Salmon⁴⁵ and Scarman⁴⁶ nevertheless volunteered that they believed that no such discretion to refuse recognition existed at all under the facts as presented.

Chaudhary v. Chaudhary,⁴⁷ like *Quazi*, involved a *talaq* divorce, but with important distinctions. The *talaq* ritual followed in *Chaudhary* was performed pursuant to the territorial law of Kashmir, which adhered strictly to the ancient Islamic doctrine, and so no notice of the divorce was required to be given to either the state or the wife.⁴⁸ Further,

³⁶ *Id.*

³⁷ *Id.* at 114. (“Further, under section 8(2)(b) of the [RDLSA], I hold that it would be contrary to public policy, which I no more seek to define or describe than did Wood J. in *Quazi v. Quazi* [citation omitted], to recognise the Canadian decree in all the circumstances and with all the consequences to which I have already referred.”).

³⁸ 1980 A.C. 744 (Fam. 1977) [hereinafter cited as *Quazi I*].

³⁹ *Quazi III*, 1980 A.C. at 800.

⁴⁰ The decision of the Court of Appeals is reported at 1980 A.C. 744, 748 (C.A. 1979) [hereinafter cited as *Quazi II*]. The High Court’s opinion (*Quazi I*) is cited *supra* note 38.

⁴¹ *Quazi III*, 1980 A.C. at 901. See also A. FYZEE, OUTLINES OF MUHAMMADAN LAW 143 (3d ed. 1963).

⁴² *Id.* at 805-06, 817.

⁴³ *Id.* at 809, 810, 812-13, 818, 826.

⁴⁴ *Quazi I*, 1980 A.C. 744.

⁴⁵ *Quazi III*, 1980 A.C. at 813.

⁴⁶ *Id.* at 826.

⁴⁷ [1985] 2 W.L.R. 350 (Fam. 1983).

⁴⁸ *Id.* at 356, 360.

although both spouses were Pakistani nationals and had been married in that country, they had each separately become British domiciliaries before the marriage came before the British courts.⁴⁹ Judge Wood of the Family Division found that the "bare" *talaq* did not qualify as a foreign "proceeding" within the meaning of the RDLA and *Quazi v. Quazi*,⁵⁰ and so was not entitled to recognition.⁵¹ The Court of Appeals, in a lengthy opinion, affirmed that decision.⁵² Each judge hearing the case also, however, voiced his view that even if the "bare" *talaq* could be understood as a "proceeding," it should nevertheless be refused recognition in the United Kingdom on the grounds that it constituted a manifest affront to British public policy. Judge Wood, at trial, attempted to base his decision in the common law:

The doctrine of public policy is a creature of the common law and prior to the commencement of the Recognition of Divorces and Legal Separations Act 1971 (1 January 1972) English courts have always reserved to themselves a residual discretion whether or not to recognise foreign decrees or orders. I have no doubt that the principles of the common law as they affect the residual discretion of English judges to refuse the recognition of foreign decrees or orders, continues and is unaffected by the provisions of the Act of 1971. I do not think that it is helpful for me to refer to a number of cases at length. . . .

. . . .

The combination of circumstances which a court in this country may need to consider when exercising its discretion under the head of public policy are limitless and I would not seek to define any limits.⁵³

Although the Court of Appeals' agreement that the "bare" *talaq* was not a "proceeding" within the meaning of the RDLA mooted the issue of public policy, each judge there discussed the question nonetheless. Lord Justice Cumming-Bruce noted that for the purposes of that inquiry "the significant feature of the instant case which distinguishes it from the facts in earlier cases such as *Quazi v. Quazi* is that by the date of the . . . divorce both parties were domiciled in England."⁵⁴ Lord Justice Oliver⁵⁵ and Judge Balcombe⁵⁶ agreed, arguing that the affront to public policy arose because one English domiciliary was evading English law so as to deny another domiciliary of her rights under that law—namely, the

⁴⁹ *Id.* at 359 (Fam.); [1985] 2 W.L.R. 350, 374-75 (C.A. 1984)

⁵⁰ *See supra* note 19.

⁵¹ *Chaudhary*, [1985] 2 W.L.R. at 358 (Fam.).

⁵² *Id.* at 367, 369, 374 (Affirmances by Cumming-Bruce, L.J.; Oliver, L.J.; and Balcombe, J.).

⁵³ *Id.* at 359-60 (Fam.).

⁵⁴ *Id.* at 366 (C.A.).

⁵⁵ *Id.* at 371.

⁵⁶ *Id.* at 374-75.

right to seek relief ancillary to her divorce petition. By implication, the Court suggested that such evasion would not have constituted a violation of local public policy if both the perpetrator and his victim had not each acquired a domicile in Great Britain before the institution of judicial proceedings.

II. LITIGATION WITH ECONOMIC CONSEQUENCES

It is an axiom of British law that, in the absence of a governing statute or convention, the British courts will generally recognize lawfully obtained foreign adjudications as a matter of comity and obligation but will reserve the right to decline recognition when that course better serves internal public policy.⁵⁷ The materials just examined, however, show that foreign judgments implicating purely private interests are rarely, if ever, denied recognition in Britain for reasons of public policy. Indeed, British courts dealing with family law matters—perhaps the area of law most intuitively likely, because of its natural connection with religion and public morality, to evoke public policy objections between sovereigns—have gone to great lengths to avoid characterizing foreign adjudications as offensive to British policy. At the same time, however, the British courts have been careful to establish in each case their residual discretion to decline recognition on this ground. That exercise is not mere futility nor fidelity to history, but neither is it primarily intended to preserve that residual discretion for cases involving practices even more repugnant than those in the case at bar. It is instead designed to save that dormant discretion so that it can be used to further British economic and commercial interests when those important concerns are diminished through foreign adjudication. Those economic interests are far less likely to be implicated by the actions of the Third World nations that make up much of the British Commonwealth and from which so many of the parties to British matrimonial disputes hail; the adjudicatory threat to British economic policy comes largely from Britain's most developed former colony, the United States.

A. The Early Doctrine

The clash of economic policy interests between the British and American judiciary began to be defined in 1952, when *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*⁵⁸ was decided by the Court of Appeals. That case concerned the enforceability in Britain of an

⁵⁷ See R. GRAVESON, *supra* note 27, at 618-19, 634-35.

⁵⁸ 1953 Ch. 19 (1952), noted in 66 HARV. L. REV. 924 (1953).

American antitrust decree obtained by the United States Government.⁵⁹ The United States District Court had ordered Imperial Chemical Industries (ICI), a British corporation, to divest itself of certain British patents it had obtained years before pursuant to an agreement with the Du Pont Chemical Company. The United States court had found the original agreement invalid as an unlawful division of markets, and so it ordered that the patents be returned to Du Pont for compulsory licensing to all parties seeking to use them in the sale of American goods in Great Britain. The patents had, however, already been assigned by ICI to another British company, British Nylon Spinners (BNS), and that entity, realizing the threat to its interests posed by the American decree, filed suit in England for an injunction prohibiting ICI from carrying out the American order.

The English High Court held, and the Court of Appeals agreed, that such an injunction was proper under the circumstances. "It is plain," the appellate court said,

that there is here a question of the comity which subsists between civilized nations. In other words, [this case] involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of the courts of another country. I certainly should be the last to indicate any lack of respect for any decision of the district courts of the United States. But I think that in this case there is raised a somewhat serious question, whether the order, in the form that it takes, does not assert an extraterritorial jurisdiction which the courts of this country cannot recognize, notwithstanding any such comity.⁶⁰

The court grounded its blockage of the American decree in a narrow exercise of characterization that considered only the second contract at issue, whereby ICI assigned its patent rights to BNS. That agreement, the court said, was between English nationals and called for performance in England, and so was "an English contract"⁶¹ which created a "species of property . . . which is English in character and is subject to the jurisdiction of the English courts."⁶² Therefore, the court reasoned, the American order voiding that contract along with the original "American" agreement in which it was rooted was an interference with English rights "the observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights."⁶³

⁵⁹ *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

⁶⁰ *British Nylon Spinners*, 1953 Ch. at 24.

⁶¹ *Id.* at 26.

⁶² *Id.*

⁶³ *Id.*

The matter came before the English courts once again on a motion to make the original injunction permanent,⁶⁴ and there the respective public policy interests of both the United States and the United Kingdom were apparently briefed quite thoroughly. ICI, attempting to overturn the injunction, argued that it violated the spirit of international comity by ordering "the deliberate violation of the laws of a friendly country."⁶⁵ However, the court refused to investigate American antitrust law on its own and similarly refused to consider the American decision as a valid application of United States law to BNS's situation, since BNS was unrepresented in the American proceeding.⁶⁶ The comity argument was thus passed over for want of supporting evidence and the injunction was allowed to stand.⁶⁷ Somewhat disingenuously in light of the court's admission two years earlier,⁶⁸ the court added that, because it had no American law to consider, "neither [the American judgment] nor any judgment of mine which the law of England requires me to give, will disturb the comity which the courts of the United States and the courts of England are so anxious and careful to observe."⁶⁹ International comity as well as local policy, then, were both deemed to have been served, despite the obvious result that the private interests of English nationals prevailed only at the expense of substantial American sovereign concerns.⁷⁰

⁶⁴ *British Nylon Spinners v. Imperial Chem. Indus.*, 1955 Ch. 37 (1954).

⁶⁵ *Id.* at 52.

⁶⁶ *Id.* at 54. Although the point is not addressed in the published opinions, one cannot help but suspect that BNS deliberately declined to submit itself to the jurisdiction of the American court.

⁶⁷ The argument advanced by ICI has, in fact, much support in English law, although, as the court's opinion illustrates, it is easily overborne when the judiciary would prefer to favor private English economic interests. For a statement of the general rule, albeit in *dicta*, see *Attorney-General of New Zealand v. Ortiz*, 1984 A.C. 1, 20 (C.A. 1982) (Lord Denning, M.R.). For a more recent example of the English courts' evasion of the rule, again through a selective evaluation of the evidence of foreign law in order to support a finding that no genuine conflict exists, see *CIA Maritima Zorroza S.A. v. Sesostri S.A.E. (The "Marques de Bolarque")*, [1984] 1 Lloyd's L.R. 652, 658-59 (Q.B.) (1983).

⁶⁸ See *supra* text accompanying note 60.

⁶⁹ *British Nylon Spinners*, 1953 Ch. at 93.

⁷⁰ The English court could have reached the same result without denying the existence of American policy interests, had it only suggested that the sovereign concerns were of equal magnitude and, in the abstract, entitled to equal deference. The court could then have relied upon the earlier characterization of the INS-BNS contract as "English in nature," see *supra* text accompanying note 61, and found that the United Kingdom's greater connections with the controversy tipped the balance in favor of the application of English law at the expense of the American adjudication. This would be the analysis, although perhaps not the result, advocated by Professor Trautman. See, e.g., Trautman, *A Study of the International Environment: The International Reach of American Regulatory Legislation Other Than The Sherman Act*, in K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 346 n.124 (1958).

B. The Current *Laker* Litigation

The English judiciary's willingness to serve local and often private economic interests, even at the expense of otherwise proper foreign adjudications, has become more evident over the years and is now the subject of protracted litigation in both the United States and the United Kingdom. The story of this latest judicial skirmish begins in February of 1982, when the inexpensive trans-Atlantic "Skytrain" service pioneered by Sir Freddie Laker was forced to ground its planes in order to avert financial collapse. Nine months later, Laker Airways filed suit in the United States District Court for the District of Columbia, alleging that it had been driven out of business by a conspiracy of other air carriers determined to monopolize the market for air travel between the United States and Western Europe.⁷¹ The complaint alleged predatory pricing and other acts in violation of the American antitrust laws⁷² and the common law of tort, and sought a grand total of 2.1 billion dollars in compensatory, treble, and punitive damages.⁷³

Discovery proceeded along the usual course until January 21, 1983, when four of the defendant foreign airlines suddenly filed separate declaratory judgment actions against Laker in the English High Court of Justice.⁷⁴ The writs sought both declarations of non-liability to Laker and permanent injunctions forbidding Laker from proceeding with its claims in the United States. In each case, the requested injunction was granted immediately, pending trial in England on the substantive claims.⁷⁵ Judge Parker, who heard the cases in the High Court, took care to note that the injunctions he granted did "not represent an interference by one court with the proceedings of another,"⁷⁶ although he named Laker's particular American civil action by number and directed that no further papers of any kind be filed with the District Court.⁷⁷ The District Court, as might be expected, did not find Judge Parker's dis-

⁷¹ See the factual background presented in *Laker Airways v. Pan American World Airways*, 559 F. Supp. 1124, 1126-27 (D.D.C. 1983) [hereinafter cited as *Laker I*], *aff'd sub nom. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) [hereinafter cited as *Laker III*].

⁷² The Sherman Antitrust Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27 (1976).

⁷³ Laker's complaint is reproduced in its entirety as an appendix to a later English decision, *British Airways Board v. Laker Airways Ltd.*, 1984 Q.B. 142, 203-09 (1983) [hereinafter cited as *British Airways I*].

⁷⁴ *Laker I*, 559 F. Supp. at 1127.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1128 n.14, quoting a transcript of the English proceedings on file with the District Court.

⁷⁷ *Id.* at 1128.

claimer convincing.⁷⁸

One week later, Judge Parker granted a similar injunction to Midland Bank, one of Laker's British financiers.⁷⁹ Midland, although not yet a party to the suit pending in the United States, feared that it would soon be added as a defendant and so sought a "first strike" to protect itself from liability.⁸⁰ In granting the injunction, Judge Parker observed that

[t]he disadvantages to Midland if Laker is permitted to proceed against them in America are . . . very considerable. They will become embroiled in a conspiracy action covering a period of some eight years but in which it is common ground that they were not involved at all until the last ten days; they will be exposed to discovery processes regarded in this country as oppressive; they will be forced to defend a case in respect of acts allegedly done here and when their witnesses and documents are all here; they will obtain no order for costs if they win; they will be subject to damages regarded here as contrary to public policy in respect of acts done, if at all, only here; and they will have litigation hanging over their heads for a much longer period than will be the case if Laker is left to pursue its claim, if there really is one, in this country . . .⁸¹

Back in the United States, Laker sought to protect what was left of its lawsuit by seeking a defensive version of the English injunction from the District Court in Washington: Laker asked Judge Greene there for an order restraining the two remaining foreign defendants and the four United States defendants from going to England in search of yet another blocking injunction. Judge Greene found both Laker's request and the story it told quite troubling, noting that "[e]xcept in unusual, very narrow circumstances, there is no basis—at least not in a free country—for precluding a citizen by an injunction-type order from suing in the courts of another nation."⁸² The Judge reviewed the rare occasions in which that step had been taken by American courts in the past and concluded that no situation analogous to the present case could be found.⁸³

Still, however, Judge Greene was unwilling to conclude that the pedestrian nature of the claims before him should preclude the extraordinary interlocutory relief requested, for the suit was just as mundane when his English counterpart had decided that it was ripe for such unusual treatment.⁸⁴ The arguments that might have been relied upon to justify the English action—primarily that Laker and most of its defend-

⁷⁸ *Id.* at 1128 n.14.

⁷⁹ *Midland Bank v. Laker Airways*, *THE TIMES* (London), Feb. 8, 1983, at 22, col. 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Laker I*, 559 F. Supp. at 1129.

⁸³ *Id.* at 1130-31.

⁸⁴ *Id.* at 1131-32.

ants were British corporations whose sovereign could properly limit their legal rights and remedies—were canvassed but were ultimately discarded. The court reasoned that all the parties to the litigation were unquestionably within its personal jurisdiction and that much of the alleged injury was in fact felt by American citizens, in the form of higher trans-Atlantic air fares.⁸⁵ The injunction was granted,⁸⁶ and the defendants' predictable response, a collective motion to dismiss the entire action on the ground of *forum non conveniens*, was impatiently dealt with in the same manner.⁸⁷ "Justice is blind," the court said of that motion, "but courts nevertheless do see what there is clearly to be seen."⁸⁸

What was clearly to be seen, of course, was the real reason for the British intervention in the first place. British law does not regard predatory pricing or any of the other alleged acts of monopolization as particularly odious; indeed, they form no basis for a cause of action in the United Kingdom at all and are seen as economically desirable in both the long and short terms.⁸⁹ English public policy, then, favored dismissal of Laker's claims just as strongly as American policy favored compensation and punishment for them. The policy positions taken by the British courts were validated shortly after Judge Greene made his decision on the *forum non conveniens* motion, when the United Kingdom's Secretary of State for Trade and Industry used his authority under Section One of the Protection of Trading Interests Act of 1980⁹⁰ to issue an order⁹¹ declaring outright that the application of the United States' antitrust laws to "any act done by a United Kingdom . . . airline"⁹² would be, in the words of the PTIA, "damaging or [would] threaten to damage the trading interests of the United Kingdom."⁹³

To implement that declaration, the Secretary issued General Directions referring specifically to the *Laker* litigation and to the possibility of an American grand jury investigation, and providing that

[e]xcept with the consent of the Secretary of State no person or persons in the United Kingdom shall comply, or cause or permit compliance, whether by themselves, their officers, servants or agents, with any requirement to

⁸⁵ *Id.* at 1133, 1135.

⁸⁶ *Id.* at 1139.

⁸⁷ *Laker Airways v. Pan American World Airways*, 568 F. Supp. 811 (D.D.C. 1983) [*Laker II*].

⁸⁸ *Id.* at 816.

⁸⁹ See *Lonrho v. Shell Petroleum Co.*, 1982 A.C. 173, 189 and *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, 35-36, 40 (1891), both cited in *Laker I*, 559 F. Supp. at 1137.

⁹⁰ See *supra* note 6.

⁹¹ 1983 Stat. Inst. 900.

⁹² *Id.*

⁹³ PTIA, *supra* note 6, at § 1(1)(b).

produce or furnish to the United States' Department of Justice, the grand jury or the District Court any commercial document in the United Kingdom or any commercial information which relates to the said Department of Justice investigation or the grand jury or District Court proceedings.⁹⁴

This declaration of public policy by the executive branch led the English Court of Appeals to continue the injunctions indefinitely.⁹⁵ As before, however, the court conspicuously disavowed any assault on the principles of international comity:

[L]et it be said . . . loudly and clearly that neither the English courts nor the English judges entertain any feelings of hostility towards the American anti-trust laws or would ever wish to denigrate that or any other American law. Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards. In the context of the United Kingdom and the United States, this comes naturally and, so far as we are concerned, effortlessly.⁹⁶

Still, local public policy triumphed. This time, the court divided the doctrine into two categories and asserted that while English courts act largely independently of the government of the day in divining and enforcing matters of domestic policy, they cannot and do not do so in the conduct of international affairs.⁹⁷ There, the court said, the United Kingdom must speak with one voice, and that must be the voice of the executive.⁹⁸

After making these points, however, the opinion grew confusing: the court abandoned earlier criticisms of both the system of American justice in general⁹⁹ and the character of the antitrust laws in particular,¹⁰⁰ and instead attacked what it called the "subject matter jurisdiction" of the American courts.¹⁰¹ The executive branch had intervened in

⁹⁴ General Directions of 1 July 1983, *quoted in* *Laker Airways v. Pan American World Airways*, 577 F. Supp. 348, 352 (D.D.C. 1983) [hereinafter cited as *Laker IV*].

⁹⁵ While waiting for the House of Lords to review that decision, Judge Greene in the United States decided that his docket could remain frozen no longer. Accordingly, he appointed an *amicus curiae* to explore, *inter alia*, the possibility of appointing a trustee or receiver to prosecute Laker's claims while that party could not do so itself. *Laker IV*, 577 F. Supp. at 355-56.

⁹⁶ *British Airways I*, 1984 Q.B. at 185-86 (Sir John Donaldson, M.R.).

⁹⁷ *Id.* at 193-94.

⁹⁸ *Id.*

⁹⁹ "[T]he days are long past," the court said:

when the English courts and judges thought that there was only one way of administering justice and that was the English way. Each nation must decide for itself which way is appropriate to its needs and there is nothing strange in two nations which enjoy a common legal heritage and could be described as 'cousins-in-law' rightly deciding that different procedures suited them best.

Id. at 185. For British criticisms of United States civil procedure, however, see *British Airways Board v. Laker Airways Ltd.*, 1985 A.C. 58, 78 (1984) (Diplock, H.L.) [hereinafter cited as *British Airways II*].

¹⁰⁰ *British Airways I*, 1984 Q.B. at 185.

¹⁰¹ *Id.* at 194.

the case at the invitation of the court and had reported that Her Majesty's Government believed that substantive jurisdiction in antitrust matters should only be permitted on the basis of territoriality or nationality,¹⁰² and not under the "effects doctrine" applied by American courts.¹⁰³ The defect alleged, however, could not properly be called "jurisdictional," as that term is understood in English law;¹⁰⁴ it instead was grounded in rawer concerns of national policy and conceptions about the appropriate business of a foreign sovereign. Still, the objection needed to be couched in jurisdictional language to adhere to traditional views about foreign adjudications, so as to justify blocking the entire American proceeding, rather than merely the frustration of whatever punitive or multiple damages might ultimately be assessed.

The Attorney General's report to the court accurately reflected a long-standing British concern. As the United States and the United Kingdom grew ever closer economically, virtually all major British economic actors could rationally expect that the consequences of their business planning might be felt in American markets. If American law could regulate British meetings and agreements with such consequences, it was feared, British law itself would be completely displaced whenever a disgruntled consumer or partner chose to take his grievance across the Atlantic. It seemed as if the only solution for the British corporation seeking to govern its domestic affairs according to the law of its homeland would be to avoid completely any submission to the personal jurisdiction of the American courts, but of course the very economic interdependence that created the problem made that course impossible.¹⁰⁵

The American and British positions are, then, diametrically op-

¹⁰² *Id.*

¹⁰³ See generally *United States v. Aluminum Company of America*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.). The evolution of the "effects doctrine" is presented from a critical American perspective in Comment, *Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?* 5 FORDHAM INT'L L.J. 469, 475-83 (1982). For a British discussion of the same subject, see Akehurst, *supra* note 1, at 190-212.

¹⁰⁴ See A. Dicey & J. Morris, *supra* note 16, at 1016-18.

¹⁰⁵ In a prophetic message, the British Ambassador to the United States warned in 1978 that: the enormous expansion of international trade since the Second World War and the increasingly close economic and commercial links between different countries have added further complexity to the pursuit of particular national antitrust policies at a time when there is no internationally accepted body of law with regard to competition policies. This is perhaps most evident in areas of particular interest and importance to individual governments . . . [including] such areas of important economic activity as natural resources and transportation.

HM Government adhere to the principle that the nationals and companies of one country who trade or operate overseas should, in the countries in which they carry on business activities, conform with the laws applying there, and should take fully into account the policy objectives established there. However, in the absence of international agreement as to the substance of competition policy and law, HM Government do not believe it to be justified in law, or condu-

posed. American courts do not see the "effects doctrine" as an extraterritorial assertion of jurisdiction at all,¹⁰⁶ but merely as a routine exercise of the United States' concurrent jurisdiction to regulate conduct which is, because of the divergence between the physical location of the actor and the intended consequences of his acts, properly the business of more than one sovereign.¹⁰⁷ As the American courts see the situation, international comity does not require one state to enforce the other's interest in the transnational conduct, but neither does it permit the deliberate frustration of concurrent sovereign authority.¹⁰⁸

Eventually the *Laker* litigation reached the House of Lords, where the theoretical foundations for the use of injunctive authority solely as a bar to foreign adjudications were tested and, ultimately, pronounced sound.¹⁰⁹ The Lords ruled, however, that such action was to be taken only when the foreign proceedings themselves threatened to produce a result "'unconscionable' in the eye of English law."¹¹⁰ The arguments made to the Lords apparently included a much deeper investigation of the underlying facts than had been undertaken in any of the lower English courts, and on the basis of the evidence uncovered, it was held that the defendants' previous conduct in both the United States and the United Kingdom estopped them from claiming that the application of American law to their situation would be unconscionable.¹¹¹ The injunctions directed at *Laker* by the lower courts were, accordingly, dissolved, with much being made of the attendant normalization of judicial relations between the two countries.¹¹²

There remained, however, the matter of the Secretary of State's General Direction forbidding cooperation with the United States District

cive to international trade, if one country unilaterally attempts to impose its national policies outside its proper and undisputed jurisdiction.

....

HM Government consider that in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside that country by foreign nationals. . . . Such an infringement of national jurisdiction inevitably gives rise to problems of conflict of jurisdiction, laws and policies and to counteraction by affected governments to defend their interests.

Diplomatic Note (No. 196) from the British Embassy at Washington, July 27, 1978, *reprinted in* 49 BRIT. Y.B. INT'L L. 390 (1979).

¹⁰⁶ *Laker III*, 731 F.2d at 923.

¹⁰⁷ *Id.* at 922-23.

¹⁰⁸ *Id.* at 937-42. See also, e.g., Grippando, *Declining to Exercise Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 395 (1983).

¹⁰⁹ *British Airways II*, 1985 A.C. at 81.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 84-87.

¹¹² *Id.* at 94-95.

Court.¹¹³ The Lords considered that order, which had the same effect as the injunction just dissolved, according to the very strict standard provided in English administrative law for the review of decisions of the executive branch,¹¹⁴ and found that they could not find the Secretary's action "wholly unreasonable."¹¹⁵ It therefore was allowed to stand,¹¹⁶ and so the American litigation remained frozen.¹¹⁷ It thus appears that for some time to come the American courts will continue to have their jurisdiction blocked and their dockets managed by foreign actions taken in the name of local public policy.¹¹⁸

C. The Ultimate Weapon: Britain's Clawback Statute

The British injunction, as an offensive weapon against American litigation grounded in economic regulation, is apparently available only to British defendants and even then is of no use once a final judgment has been entered by the American courts. As mentioned earlier,¹¹⁹ however, there is another far more potent and considerably more offensive—in every sense of the word—weapon offered by the British courts. The "clawback" provisions of the PTIA¹²⁰ allow any British citizen or corporation,¹²¹ or any person or corporation doing business in Great Britain,¹²² to recover in a British court whatever amount might be levied against them by a non-British court in the form of treble or other multiple damages.¹²³ The language dealing with those "carrying on business in the United Kingdom"¹²⁴ is apparently meant to be construed quite broadly, so as to make the clawback option widely available. During debate on the Act in Parliament, it was observed that the statutory language meant to convey

a very extraordinary gift to somebody who is not, in fact, a British subject, not a British trading company, not somebody who is permanently carrying

¹¹³ *Id.* at 91. See also *Laker IV*, 577 F. Supp. at 352 and *supra* note 94 and accompanying text.

¹¹⁴ *British Airways II*, 1985 A.C. at 92.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 95-96.

¹¹⁷ But see *supra* note 95. The conclusions of the *amicus curiae* have yet to be reported.

¹¹⁸ For a recently published, enlightening debate between an English solicitor in the Department of Trade and Industry and the author of the D.C. Circuit's opinion in *Laker III*, see *The Symposium on Transnational Litigation—Part II: Perspectives From the United States and Abroad*, 18 INT'L LAW. 773-78, 779-84 (1984) (contributions by W. Beckett and the Hon. M. Wilkey). See also Lindrup, *Laker: The Issues of Jurisdiction and Public Policy*, 135 NEW L.J. 50, 90 (1985).

¹¹⁹ See *supra* notes 4-8, and accompanying text.

¹²⁰ See *supra* note 6, at § 6.

¹²¹ *Id.* § 6(1)(a)-(b).

¹²² *Id.* § 6(1)(c).

¹²³ *Id.* § 6(1).

¹²⁴ *Id.* § 6(1)(c).

out business in this country, if he happens to be a foreigner.¹²⁵

....

[S]urely the clause as drawn . . . would by implication cover anybody who decided, having a small amount of business over here—be it as a commercial traveller embarking on some business three times a year—to claim the benefit of this right by merely travelling over here and saying: “It is perfectly true, I carry on business here.”¹²⁶

Like the injunctions and government orders issued during the *Laker* litigation, the PTIA was motivated by an abiding British conviction that the nation’s public policy was being steadily undercut by judicial activity in the United States.¹²⁷ The clawback provision itself was recognized as “contentious”¹²⁸ and likely to “incur . . . odium in the United States,”¹²⁹ and was acknowledged to be “unprecedented not only in our own law but throughout the world.”¹³⁰ It permits British courts to enter clawback judgments “notwithstanding that the person against whom the proceedings are brought is not within the jurisdiction of the court,”¹³¹ and, even more remarkably, notwithstanding the lack of any British connection with the subject matter of the action.¹³²

By way of example, one might imagine a Japanese corporation engaged in the manufacture of electronic goods exclusively for sale to Americans who maintain absolutely no contacts with the United Kingdom. Further imagine that the Japanese company conspires with its competitors to fix the price of its goods in violation of the American antitrust laws.¹³³ So long as the Japanese corporation carries on some slight business in the United Kingdom—involving, for example, the purchase of business cards for its Tokyo executives—it can turn to the English courts to undo any treble damage judgment that might be en-

¹²⁵ 404 Parl. Deb., H.L. (5th ser.) 554, 590 (1980).

¹²⁶ *Id.* at 592.

¹²⁷ One Lord went so far as to admit to Parliament that “the Bill is really the culmination of bitterness about the policy of the United States—often referred to as the ‘judicial imperialism of the United States of America.’” *Id.* at 569-70 (Lord Lloyd of Kilgerran). Another observed that “it gives further evidence of our refusal as a country to be clobbered by friend or foe, great or small.” *Id.* at 576 (Lord Renton). See also the remarks of the Earl of Inchcape, *Id.* at 580-83.

¹²⁸ *Id.* at 567 (Lord Elwyn-Jones).

¹²⁹ *Id.* at 569.

¹³⁰ House of Commons Standing Comm. F, *supra* note 5, at 67. See also 404 Parl. Deb., H.L. (5th ser.) 554, 567 (1980), where Lord Elwyn-Jones said: “[W]e are plunging into deep waters here and taking a road which has not been taken before.”

¹³¹ PTIA, *supra* note 6, at § 6(5).

¹³² See 976 Parl. Deb., H.C. (5th ser.) 1023, 1046 (1979), where Mr. Ogden said: “The trade that we are protecting has nothing to do with British trade in the true sense.” See also Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1111 n.88 [hereinafter cited as Note, *Power to Reverse*].

¹³³ See Sherman Antitrust Act, *supra* note 72, at § 1.

tered against it in the United States in connection with its electronics sales.¹³⁴ The same course, however, would not be open to an American company, for American citizens and corporations are specifically barred from challenging the judgments of their own courts by bringing clawback actions themselves.¹³⁵

No British court has yet entered a clawback judgment against a successful American antitrust plaintiff, largely because British law tends to respect the corporate fiction to a very great extent and generally forbids the attachment of one company's assets in satisfaction of a debt incurred by a parent or subsidiary.¹³⁶ Thus a corporation in fear of having its American antitrust award reversed through British clawback proceedings need only make certain that its British assets are held by separate, albeit closely related, legal entities.¹³⁷ Apparently, the Parliament intended the clawback as it now stands to be simply a warning shot fired across the American judicial bow,¹³⁸ but it has reserved the right to add whatever force is necessary to the statute if the American courts continue to enforce their "effects doctrine" against foreign defendants.¹³⁹ The clawback thus looms large and ominously in the future of Anglo-American judicial and trade relations. The British courts already claim the right both to enjoin¹⁴⁰ and to overrule unwelcome decisions of their counterparts in the United States, and the day when they decide to more boldly extend that self-proclaimed authority—even to cases with no ostensible British interest¹⁴¹—may not be far off.

¹³⁴ This example is based on one proposed in Note, *Power to Reverse*, *supra* note 132, at 1111. That example was, in turn, rooted in a hypothetical case posed first on the floor of Parliament during consideration of the PTIA. See 976 Parl. Deb., H.C. (5th ser.) 1023, 1033 (1979).

¹³⁵ PTIA, *supra* note 6, at § 6(3).

¹³⁶ Commission of the EEC, "1969 British Aide-Memoire", reprinted in 1967 BRIT. PRAC. INT'L L. 58 (1971).

¹³⁷ See Note, *Power to Reverse*, *supra* note 132, at 1112.

¹³⁸ See generally 405 Parl. Deb., H.L. (5th ser.) 926, 934 (1980) (Lord Hacking) ("[N]obody really expects the provisions of the bill to be used."); *Id.* at 943 (Lord Lloyd of Kilgerran) ("[I]n so far as British industry is concerned, [the clawback] has no effect whatsoever from the view of realistic commercial sense.").

¹³⁹ The Lord Advocate, Lord Makey of Clashfern, reported that "Her Majesty's Government will be paying very close attention to how the situation develops and will consider bringing forward in future further legislation in this field, if it should prove to be necessary." *Id.* at 942. See also the Lord Advocate's promise that the Government would specifically consider "drawing aside the corporate veil in the case of groups of companies, and possibly enabling the person against whom a multiple damages award had been made to go against the property of a subsidiary or associated company directly." 404 Parl. Deb., H.L. (5th ser.) 554, 593-94 (1980).

¹⁴⁰ See *supra* note 109 and accompanying text for a discussion of the *Laker* litigation.

¹⁴¹ See *supra* note 132 and accompanying text.

III. THE FUTURE OF THE PUBLIC POLICY DOCTRINE

The United Kingdom is surely entitled to give effect to its own internal public policy through its courts, and it should not, as a general principle, be required to give effect to foreign adjudications which it finds patently offensive. This principle, however, has its limits. It must be exercised in an intellectually honest fashion and must in any event be reconciled with the reality of an interdependent world. When the doctrine of public policy is articulated alongside an outright denial of its implications for the international order,¹⁴² or when it is reserved in one area of the law only to be used exclusively in another,¹⁴³ its integrity is diminished and the principle itself becomes unprincipled.

Indeed, the United Kingdom itself would confine the exercise of foreign courts' subject matter jurisdiction to cases grounded in either the nationality or territorial presence of the parties.¹⁴⁴ In making the clawback¹⁴⁵ and the blocking injunction¹⁴⁶ available to foreign parties, however, it contravenes that very limitation. The British, of course, would argue that those measures are purely defensive maneuvers against American juridical aggression,¹⁴⁷ but even in war there must be rules.

At a minimum, then, it seems reasonable to insist that whatever jurisdiction the United Kingdom has to refuse recognition to foreign adjudications be exercised only in support of British nationals. This would comport with the doctrine of public policy as announced in the arena of family law,¹⁴⁸ but would restrict the threatened extension of that authority to non-British concerns injured by economic regulation abroad.¹⁴⁹

Care must be taken, as well, to insure that the beneficiary of the blocking jurisdiction deserves rescue under that jurisdiction's own internal law. Considerations of international comity cannot sanction interference with the concededly proper jurisdiction of a foreign sovereign except, perhaps, as a last resort for the protection of basic human rights,¹⁵⁰ and that ground for intervention is not implicated in matters of international corporate affairs and, in any event, appears to have been all

¹⁴² See *supra* notes 64-70, 77-82, 96-105 and accompanying text.

¹⁴³ See *supra* notes 27-32, 53 and accompanying text.

¹⁴⁴ See *supra* note 102 and accompanying text.

¹⁴⁵ See *supra* notes 119-41 and accompanying text.

¹⁴⁶ See *supra* notes 57-118 and accompanying text.

¹⁴⁷ See, e.g., 404 Parl. Deb., H.L. (5th ser.) 554, 583 (1980) (The Earl of Inchcape).

¹⁴⁸ See the Court of Appeals' discussion of the issue in *Chaudhary*, *supra* notes 55-56 and accompanying text.

¹⁴⁹ See *supra* notes 131-35 and accompanying text.

¹⁵⁰ See, e.g., the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71-77 (1948).

but abandoned in the United Kingdom today.¹⁵¹ There is no basis for sanctioning the deliberate violation of foreign economic laws by persons or corporations squarely within their accepted sphere of operation, and English courts should make certain that English plaintiffs seeking relief from such laws have not fallen within the jurisdiction of foreign sovereigns according to principles, such as territorial operations, which would have given the foreign courts jurisdiction over the challenged activity according to English notions of civil procedure.¹⁵²

Lastly and most importantly, a court intent on blocking or reversing another's decisions should firmly establish that it has a closer relationship to the underlying controversy than does the foreign power whose adjudicatory activity would be curtailed. This means, for example, that a suit should not be blocked or frustrated if no alternative forum for its adjudication or enforcement is available and if the blocking jurisdiction's own affairs are not substantially implicated by the litigation. The aspirational goal of the international order should be a system in which each controversy is judged according to the law most closely related to it, and one sovereign's abstract preference for a particular outcome in a foreign forum should not overcome that forum's own, more intimate, sovereign interest in the matter.

¹⁵¹ See *supra* notes 16-56 and accompanying text for a discussion of marital judgments and other private, non-commercial litigation.

¹⁵² The fear that the English courts often impose a double standard is legitimate. In the *Laker* litigation, for example, it was alleged that the foreign defendants had conspired to ruin Laker's business while their executives were attending a 1982 meeting of the International Air Transport Association in Florida. See *Laker I*, 559 F. Supp. at 1126-27. Such conduct would implicate the "territorial principle," *supra* note 101 and accompanying text, and would have bestowed upon the American courts a jurisdiction recognized in England. See *supra* note 102 and accompanying text. The English courts ignored that argument, however, and blocked the American proceedings nonetheless.